IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.165 OF 2006

Babasaheb Dhondiba Hagare ...Appellant
Vs.
Baydabi Tatyaram Pondukale & Ors. ...Respondents

Mr N.V. Bandiwadekar for the Appellant.
Mr R.S. Kate for the Respondent No.1.

CORAM : A. S. OKA, J.
DATE : APRIL 04, 2006.

P.C.:

1. Heard Shri Bandiwadekar appearing for the Appellant. The Appellant is the original Defendant No.1 and the Respondent No.1 is the original Plaintiff. Suit filed by the Respondent No.1-Plaintiff was dismissed by the Trial Court. In an Appeal preferred by the Respondent No.1, the decree of the Trial Court has been reversed by holding that there is a right of way available to the Respondent No.1 as prayed in the plaint.

2. Shri Bandiwadekar appearing for the Appellant placed reliance on Commissioner’s Report which is referred to in the decision of the Trial Court. He submitted that the Respondent No.1 has not raised any objection to the Commissioner’s Report. He submitted

that the report of the Commissioner clearly discloses that the alleged road passes through property of the Respondent No.1 himself and the alleged road is not in existence as pleaded in the plaint. He, therefore, submitted that decree for injunction could not have been passed by the Appellate Court.

3. I have considered the submissions. The Appellant-Defendant No.1 and the Respondent No.1-Plaintiff have purchased two parts of land bearing Gat No.46/3A/1/2 from the same vendor. The Sale Deed executed in favour of the Respondent No.1- Plaintiff is prior in point of time. The said Sale Deed clearly recites that a right is conferred on the Respondent No.1 to use common road having width of 10 feet which is located abutting a ‘bandh’ on the western side of the property sold to the Respondent No.1. Same is the description of the road mentioned in the plaint filed by the Respondent No.1. The Appellant No.1 has purchased other part of the same Gat number from the same vendor subsequent to the execution of the Sale Deed in favour of the Respondent No.1. Thus, it is clear that right of way was conferred on the

Respondent No.1 by the common predecessor-in-title of the Appellant and the Respondent No.1.

4. In view of this position, the report of the Commissioner is not relevant for deciding the legal rights available to the parties.

5. The Appellate Court has recorded a finding of existence of right of way on the basis of documentary evidence on record. The said finding cannot be interfered with in the Second Appeal under section 100 of the Code of Civil Procedure, 1908.

6. There is no merit in the Second Appeal and the same is dismissed with no orders as to costs.

JUDGE